No. 09-654

In the Supreme Court of the United States

ORTHO BIOTECH PRODUCTS, L.P., PETITIONER

v.

UNITED STATES, EX REL. CHINYELU DUXBURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

JEFFREY B. WALL
Assistant to the Solicitor General

DOUGLAS N. LETTER
CHARLES W. SCARBOROUGH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a relator in a *qui tam* action under the False Claims Act, 31 U.S.C. 3729 *et seq.*, must provide the government with information about his allegations of fraud before the public disclosure of those allegations occurs in order to qualify as an "original source" under 31 U.S.C. 3730(e)(4)(B).

2. Whether a relator must identify specific false claims submitted for payment to the government in order to plead fraud with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 9
A. Because Congress recently amended the FCA's definition of the term "original source," the first question presented is not of sufficient continuing importance to warrant this Court's review 10
B. In light of the potential jurisdictional barrier to respondent's suit, this case is not an appropriate vehicle for addressing the proper application of Federal Rule of Civil Procedure 9(b) to *qui tam* complaints under the FCA 14
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Graham County Soil & Water Conservation Dist. v. *United States ex rel. Wilson*, 130 S. Ct. 1396 (2010) 4, 13
Hopper v. *Solvay Pharms., Inc.*, 588 F.3d 1318 (11th Cir. 2009), petition for cert. pending, No. 09-1065 (filed Mar. 4, 2010) 16
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 3, 4, 13
Minnesota Ass'n of Nurse Anesthetists v. *Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir.), cert. denied, 537 U.S. 944 (2002) 11
Pharmaceutical Indus. Average Wholesale Price Litig., In re, 263 F. Supp. 2d 172 (D. Mass. 2003) 5

Cases—Continued: Page

Rockwell Int'l Corp. v. *United States*, 549 U.S. 457 (2007) 3, 10, 18
United States ex rel. Atkins v. *McInteer*, 470 F.3d 1350 (11th Cir. 2006) 16
United States ex rel. Bledsoe v. *Community Health Sys., Inc.*, 501 F.3d 493 (6th Cir. 2007) 15, 16
United States ex rel. Clausen v. *Laboratory Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003) 16
United States ex rel. Dick v. *Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990) 11
United States ex rel. Eisenstein v. *City of New York*, 129 S. Ct. 2230 (2009) 2
United States ex rel. Findley v. *FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997) 11, 12
United States ex rel. Grubbs v. *Kanneganti*, 565 F.3d 180 (5th Cir. 2009) 15
United States ex rel. Joshi v. *St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir.), cert. denied, 549 U.S. 881 (2006) 16
United States ex rel. Karvelas v. *Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir.), cert. denied, 543 U.S. 820 (2004) 7, 15
United States ex rel. Lusby v. *Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009) 15
United States ex rel. McKenzie v. *BellSouth Telecomms., Inc.*, 123 F.3d 935 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998) 11, 12

Cases—Continued: Page

United States ex rel. Rost v. *Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007) 8, 14
United States ex rel. Sikkenga v. *Regence BlueCross BlueShield*, 472 F.3d 702 (10th Cir. 2006) 15
United States ex rel. Siller v. *Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), cert. denied, 513 U.S. 928 (1994) 11
United States ex rel. Walker v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005), cert. denied, 549 U.S. 1027 (2006) 16
Wang v. *FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) 11

Statutes and rule:

False Claims Act, 31 U.S.C. 3729 *et seq.* 1
31 U.S.C. 3729(a)(1) 1
31 U.S.C. 3730(a) 1
31 U.S.C. 3730(b)(1) 2
31 U.S.C. 3730(b)(2) 2
31 U.S.C. 3730(b)(3) 2
31 U.S.C. 3730(c)(3) 2
31 U.S.C. 3730(d) 2
31 U.S.C. 3730(e)(4) 3, 4, 9, 13, 14
31 U.S.C. 3730(e)(4)(A) 6, 10
31 U.S.C. 3730(e)(4)(B) ..... *passim*
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 3
§ 10104(j)(2), 124 Stat. 901 (to be codified at 31 U.S.C. 3730(e)(4) (Supp. IV 2010)) 3, 13, 14

Statutes and rule—Continued: Page

§ 10104(j)(2), 124 Stat. 901 (to be codified at 31 U.S.C. 3730(e)(4)(B)(i) (Supp. IV 2010)) 12

§ 10104(j)(2), 124 Stat. 902 (to be codified at 31 U.S.C. 3730(e)(4)(B)(ii) (Supp. IV 2010)) . 12, 13

Fed. R. Civ. P. 9(b) ..... *passim*

In the Supreme Court of the United States

No. 09-654

ORTHO BIOTECH PRODUCTS, L.P., PETITIONER

v.

UNITED STATES, EX REL. CHINYELU DUXBURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Attorney General may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring his own

suit (commonly referred to as a *qui tam* action) "for the person and for the United States Government." 31 U.S.C. 3730(b)(1); see *United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2232 (2009) (quoting 31 U.S.C. 3730(b)(1)).

If a relator brings a *qui tam* action, the complaint is initially filed under seal and served upon the government, together with "substantially all material evidence and information the [relator] possesses." 31 U.S.C. 3730(b)(2). "The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information," *ibid.*, and the district court may extend the 60-day period upon a showing of good cause, 31 U.S.C. 3730(b)(3). If the government declines to intervene, the relator "shall have the right to conduct the action," but the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

Until recently, the FCA's "public disclosure" provision stated:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4) (footnote omitted); see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 944, 946 (1997). This version of 31 U.S.C. 3730(e)(4) establishes a non-waivable limitation on the subject-matter jurisdiction of the federal courts. *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 467-470 (2007).

On March 23, 2010, however, the President signed into law the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119. The PPACA amends the FCA's "public disclosure" provision, including its definition of the term "original source." Specifically, Section 10104(j)(2) of the PPACA amends 31 U.S.C. 3730(e)(4) to provide as follows:

> (4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media, unless the action is brought by the Attorney General or the person

> bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (ii) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

See *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010) (*Graham County*) (noting the legislative change).

The Court in *Graham County* stated that the PPACA "makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates [the defendants'] claimed defense to a *qui tam* suit." 130 S. Ct. at 1400 n.1; see *Hughes Aircraft*, 520 U.S. at 945-952 (declining to give retroactive effect to FCA amendment that expanded the range of circumstances in which *qui tam* suits could be filed). The first question presented in this case, which involves the application of the FCA's "public disclosure" provision to respondent's complaint, therefore continues to be governed by the pre-PPACA version of 31 U.S.C. 3730(e)(4).

2. Petitioner Ortho Biotech Products, L.P., markets and distributes Procrit, a drug that is used to treat patients with severe anemia. In November 2003, respondent Mark Duxbury, who worked for petitioner from 1992 to 1998, brought a *qui tam* action under the FCA. Respondent alleged that petitioner had been engaged

since 1992 in an unlawful scheme to promote the use of Procrit, which in turn had caused medical providers to submit false claims to federal health insurance programs including Medicare. Specifically, respondent alleged that petitioner had inflated its published "average wholesale price" (AWP) of Procrit, which is the price used by Medicare for reimbursement; had marketed Procrit at a lower price, allowing medical providers to profit on the difference between the AWP and the actual price; had given other kickbacks to medical providers in order to induce them to purchase Procrit; and had promoted off-label uses of Procrit. Pet. App. 5a-7a.

Respondent's *qui tam* action was not the first suit premised on such allegations. In September 2002, other plaintiffs had filed a consolidated complaint in multidistrict litigation, alleging that petitioner and other pharmaceutical companies had inflated the published AWPs for many of their prescription drugs. Pet. App. 5a-6a; see *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172, 176 (D. Mass. 2003). That action, like the present suit, also alleged that pharmaceutical companies including petitioner had offered kickbacks to medical providers in order to induce them to purchase prescription drugs. Pet. App. 53a.

In April 2004, the government requested in writing that respondent provide additional information about the allegations in his complaint. In July 2004, respondent provided a written disclosure of that information. In July 2005, the government declined to intervene in the suit, leaving respondent to conduct the action. In October 2006, respondent amended his complaint. As relevant here, in Count 1 of his amended complaint, respondent alleged that petitioner had provided kickbacks

to medical providers, thereby inducing them to purchase Procrit and to submit false claims for payment of the inflated AWP to Medicare. Pet. App. 9a-11a.[1]

3. On January 28, 2008, the district court granted petitioner's motion to dismiss the complaint with prejudice. Pet. App. 44a-78a.

a. The district court held that it had jurisdiction to consider respondent's kickback claim. In the court's view, that claim was "based upon the public disclosure of allegations" in a "civil * * * hearing," 31 U.S.C. 3730(e)(4)(A), namely, the similar kickback allegations in the AWP multidistrict litigation. Pet. App. 59a. The court held, however, that respondent had "independent and direct" knowledge, and therefore was an "original source," with regard to the complaint's "allegations concerning the 1992-1998 time period" when he was employed by petitioner. *Id.* at 61a.

Petitioner argued that respondent did not qualify as an "original source" because he had not provided the government with the information upon which his suit was based prior to the public disclosure. Pet. App. 60a. The district court rejected that contention. The court stated that "[t]he plain language of [31 U.S.C. 3730(e)(4)(B)] only requires the relator to provide his information to the government prior to filing his action,"

---

[1] Respondent's amended complaint contained two other counts that are not at issue here. Count 2 alleged that petitioner had engaged in a scheme to inflate Procrit's AWP. The parties subsequently stipulated to dismissal of Count 2. Pet. App. 10a n.5. Count 3 alleged that petitioner had promoted off-label uses that involved higher doses of Procrit, thus accelerating the rate at which false claims for payment were submitted to Medicare. *Id.* at 10a-11a. The district court dismissed Count 3 as barred by an earlier *qui tam* action, the court of appeals affirmed that portion of the district court's order, and respondent has not sought review of that decision in this Court. *Id.* at 43a.

ibid., and it explained that respondent had "alleged in his initial complaint instigating the action that he had provided the information to the government prior to filing the suit," *id.* at 61a.

b. The district court held, however, that respondent's suit should be dismissed because his complaint failed to plead fraud with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b). The court acknowledged that respondent's amended complaint "alleges particularized details about [petitioner's] underlying scheme to induce doctors to prescribe Procrit by granting them a variety of kickbacks." Pet. App. 73a. The court stated, however, that the complaint does not contain "particularized allegations regarding the false claims that were actually submitted to the federal government." *Ibid.* The court concluded that, because respondent had failed "to identify a single false claim" submitted by medical providers, the complaint lacked the particularity required by Rule 9(b) and circuit precedent. *Id.* at 75a-77a (citing *United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 232-233 (1st Cir.), cert. denied, 543 U.S. 820 (2004)).

4. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1a-43a.

a. The court of appeals affirmed the district court's holding that respondent was an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B) because he had provided the government with his information before filing suit. Pet. App. 16a-17a.[2] The court recognized that, under the construction of Section 3730(e)(4)(B) adopted by some other circuits, the relator must be the

---

[2] Respondent did not dispute that his kickback claim was based upon the public allegations in the AWP multidistrict litigation. Pet. App. 15a.

source of the public disclosure or provide his information to the government prior to the public disclosure in order to qualify as an "original source." *Ibid.* But the court rejected those requirements as inconsistent with "the plain terms of [Section] 3730(e)(4)(B)," *id.* at 18a, which require the relator to "provide[] the information to the Government before filing an action," 31 U.S.C. 3730(e)(4)(B). See Pet. App. 18a-21a. The court of appeals also examined the structure and history of Section 3730(e)(4) and found that they further supported the court's construction of the term "original source." *Id.* at 22a-30a.

b. The court of appeals reversed the district court's holding that respondent had failed to plead his kickback claim with sufficient particularity. Pet. App. 32a. The court explained that a relator can "satisfy Rule 9(b) by providing 'factual or statistical evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details as to each false claim." *Id.* at 33a (quoting *United States ex rel. Rost* v. *Pfizer, Inc.*, 507 F.3d 720, 733 (1st Cir. 2007)). Applying that standard, the court noted that respondent had named eight medical providers who had allegedly provided false claims. *Id.* at 34a-35a. In addition, respondent had supplied the approximate "dates and amounts of the false claims filed by these providers with the Medicare program." *Id.* at 35a. The court concluded that, by providing those details about the false claims that petitioner had caused to be submitted, respondent had alleged with sufficient particularity "that false claims were in fact filed by the medical providers he identified." *Id.* at 38a.

DISCUSSION

Neither of the questions presented warrants the Court's review in this case. With respect to the first question, the court of appeals' interpretation of the FCA's "original source" provision, 31 U.S.C. 3730(e)(4)(B), deepens an existing conflict between decisions of several other courts of appeals. Congress has effectively resolved that conflict, however, by amending Section 3730(e)(4)(B)'s definition of the term "original source." Because the first question presented concerns the interpretation of a now-superseded statutory provision, it is not of sufficient continuing importance to warrant plenary review by this Court.

With respect to the second question, the court of appeals correctly held that a *qui tam* complaint may be sufficiently particularized to satisfy Federal Rule of Civil Procedure 9(b) even if it does not identify specific false claims that are alleged to have been submitted. On that issue as well, the court of appeals' decision deepens an existing circuit conflict, and this Court's review likely would be warranted in an appropriate case. This case, however, is not a suitable vehicle for resolving the Rule 9(b) question. Because former 31 U.S.C. 3730(e)(4) limited the subject-matter jurisdiction of the federal courts, the Court could not address the Rule 9(b) issue in this case unless it first determined (contrary to petitioner's position) that respondent qualified as an "original source" under pre-PPACA law. As a result, the jurisdictional question (which is not of continuing importance) might prevent the Court from reaching the Rule 9(b) question (which is of continuing importance). Accordingly, the Court should deny the petition for a writ of certiorari.

A. Because Congress Recently Amended The FCA's Definition Of The Term "Original Source," The First Question Presented Is Not Of Sufficient Continuing Importance To Warrant This Court's Review

1. The version of the FCA that governs this case divests courts of jurisdiction over any *qui tam* action "based upon the public disclosure of allegations" of fraud, "unless * * * the person bringing the action is an original source of the information." 31 U.S.C. 3730(e)(4)(A). Section 3730(e)(4)(B) establishes two criteria that a relator must satisfy in order to qualify as an "original source." The relator must have (1) "direct and independent knowledge of the information on which the allegations are based," and he must have (2) "voluntarily provided the information to the Government before filing an action * * * which is based on the information." 31 U.S.C. 3730(e)(4)(B).

In this case, petitioner does not appear to dispute that respondent had "direct and independent knowledge of the information" that formed the basis of his *qui tam* complaint. Petitioner argues, however, that respondent does not satisfy the second prerequisite to "original source" status because he did not provide the information to the government until after the relevant public disclosure had occurred. The courts of appeals are divided over precisely when a relator must provide the government with the information on which his suit is based in order to qualify as an "original source."[3]

---

[3] In *Rockwell International Corp.* v. *United States*, 549 U.S. 457 (2007), this Court held that, in order to qualify as an "original source," a relator must have "direct and independent knowledge of the information" that is the basis for the allegations in his complaint. *Id.* at 470-472. The Court did not address, however, when a relator must provide such

In the decision below, the First Circuit joined the Fourth and Eighth Circuits in holding that a relator need only provide his information to the government before filing his *qui tam* action. Pet. App. 16a-30a; see *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1351-1355 (4th Cir.), cert. denied, 513 U.S. 928 (1994); *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050-1051 (8th Cir.), cert. denied, 537 U.S. 944 (2002). By contrast, the District of Columbia and Sixth Circuits have held that a relator must provide his information to the government prior to the public disclosure of the relevant fraud allegations. See *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 690-691 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997); *United States ex rel. McKenzie* v. *BellSouth Telecomms., Inc.*, 123 F.3d 935, 941-943 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998). And the Second and Ninth Circuits have adopted an altogether different approach by holding that, regardless of when a relator provides his information to the government, he must be the source of the public disclosure in order to bring his own *qui tam* action. See *United States ex rel. Dick* v. *Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1418-1419 (9th Cir. 1992).

Before the recent amendments to Section 3730(e)(4)(B), the government repeatedly argued, including in the court of appeals in this case, that the rule adopted by the District of Columbia and the Sixth Circuits best accords with the text, structure, and purpose of that provision. In order to be naturally characterized

---

information to the government in order to come within the definition of "original source" contained in 31 U.S.C. 3730(e)(4)(B).

as a "source" of information "provided" to the government, 31 U.S.C. 3730(e)(4)(B), a relator must turn over to the government information that is not already in the public domain or otherwise in the government's possession. See *McKenzie*, 123 F.3d at 942; *Findley*, 105 F.3d at 690-691. Moreover, requiring a relator to provide his information to the government in advance of any public disclosure serves the FCA's purpose of alerting the government to potential fraud. See *McKenzie*, 123 F.3d at 942-943. A relator who gives his information to the government after a public disclosure has already occurred does little or nothing to further that central objective.

2. As amended, Section 3730(e)(4)(B) allows a relator to qualify as an "original source" in either of two ways. First, the relator will qualify if, "prior to a public disclosure," he "voluntarily disclose[s] to the [g]overnment the information on which allegations or transactions in a claim are based." PPACA, Pub. L. No. 111-148, 124 Stat. 901 (to be codified at 31 U.S.C. 3730(e)(4)(B)(i) (Supp. IV 2010)). Second, if the relator "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions," then he will qualify as an "original source" if he "voluntarily provide[s] the information to the [g]overnment before filing [a *qui tam*] action." 124 Stat. 902 (to be codified at 31 U.S.C. 3730(e)(4)(B)(ii) (Supp. IV 2010)).

The two-part definition of "original source" set forth in amended Section 3730(e)(4)(B) does not precisely correspond to any circuit's interpretation of the prior provision. In order to qualify as an "original source" under new Section 3730(e)(4)(B)(i), a relator must provide his information to the government prior to the public disclosure of the relevant fraud allegations. That requirement

essentially tracks the construction of the pre-PPACA provision that the District of Columbia and Sixth Circuits had adopted. Even a relator who does not satisfy that requirement, however, can qualify as an "original source" under new Section 3730(e)(4)(B)(ii) if he comes forward with information that materially adds to the publicly disclosed allegations and provides that information to the government before filing suit. That provision establishes a test for "original source" status that had not previously been adopted by any court of appeals.

3. If Section 3730(e)(4) had not been amended, the first question presented in the petition may have warranted resolution by this Court. By amending Section 3730(e)(4), however, Congress clarified the law going forward and thereby obviated the need for this Court's intervention. To be sure, the question presented will have some continuing practical significance because former Section 3730(e)(4) remains applicable to suits that were filed before the PPACA was enacted. See p. 4, *supra*.[4] That sort of continuing effect, however, is a nat-

---

[4] This Court has recognized that the PPACA "makes no mention of retroactivity, which would be necessary for its application to pending cases." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010). In *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court held that FCA amendments enacted in 1986, which expanded the range of permissible *qui tam* actions by replacing the prior "government knowledge" bar on *qui tam* suits with the "public disclosure" bar contained in Section 3730(e)(4), likewise should not be given retroactive effect. See *id.* at 945-951. The Court in *Hughes Aircraft* further explained that, "[b]ecause both the allegedly false claim submission and the disclosure to the Government of information about that submission occurred prior to the effective date of the 1986 amendments, we need not address which of these two events constitutes the relevant conduct for purposes of our retroactivity analysis." *Id.* at 946 n.4. Under

ural and routine consequence of the presumption against statutory retroactivity, and it is not a sufficient reason for this Court to grant plenary review to construe a superseded FCA provision. Accordingly, this Court should deny certiorari on the first question presented.

B. In Light Of The Potential Jurisdictional Barrier To Respondent's Suit, This Case Is Not An Appropriate Vehicle For Addressing The Proper Application Of Federal Rule Of Civil Procedure 9(b) To *Qui Tam* Complaints Under The FCA

1. In this case, the court of appeals held that a relator can "satisfy [Federal Rule of Civil Procedure] Rule 9(b) by providing 'factual or statistical evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details as to each false claim." Pet. App. 33a (quoting *United States ex rel. Rost* v. *Pfizer, Inc.*, 507 F.3d 720, 733 (1st Cir. 2007)). Applying that standard, the court noted that respondent had named eight medical providers who had allegedly provided false claims. *Id.* at 34a-35a. In addition, respondent had supplied the approximate "dates and amounts of the false claims filed by these providers with the Medicare program." *Id.* at 35a. The court of appeals therefore concluded that respondent had alleged with sufficient particularity "that false claims were in

---

Graham County (which indicates that the PPACA does not apply to "pending cases") and *Hughes Aircraft*, it is unclear whether the application of amended Section 3730(e)(4) turns on the date when the alleged false claims were submitted, the date when the public disclosure occurred, or the date when the *qui tam* suit was filed. Under any of those approaches, however, suits like this one, in which the relator's complaint was filed before the PPACA's enactment, will be governed by the prior version of Section 3730(e)(4).

fact filed by the medical providers he identified." *Id.* at 38a.

The court of appeals' decision is correct and consistent with recent decisions of other courts of appeals. Rule 9(b) does not impose an absolute requirement that a relator identify a specific false claim submitted to the government in order to avoid dismissal of his complaint. Although a plaintiff "must state with particularity the circumstances constituting fraud or mistake," Fed. R. Civ. P. 9(b), a *qui tam* complaint may be sufficiently detailed and particularized to satisfy that requirement even though it does not identify specific false claims. See *United States ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854-855 (7th Cir. 2009) (Easterbrook, C.J.); *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009). As the Seventh Circuit explained in *Lusby*, it is not "essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit." 570 F.3d at 854. Indeed, even a relator with detailed knowledge of the manner in which a fraudulent scheme was executed may lack access to that type of paperwork. *Ibid.*

2. By contrast, other courts of appeals have issued decisions stating that particular *qui tam* complaints should be dismissed under Rule 9(b) because relators had failed to identify specific false claims for payment submitted to the government. See *United States ex rel. Bledsoe* v. *Community Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007) ("We hold that pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)."); see also *United States ex rel. Sikkenga* v. *Regence BlueCross BlueShield*, 472 F.3d 702, 727-728 (10th Cir. 2006) (affirming dismissal of

cause of action that failed "to identify any specific [false] claim"); *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1358-1360 (11th Cir. 2006) (same); *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 560 (8th Cir.) (requiring the relator to plead "some representative examples" of false claims), cert. denied, 549 U.S. 881 (2006). At least one of those circuits has not consistently adhered to that understanding of Rule 9(b).[5] At a minimum, however, the overall body of appellate precedent creates substantial uncertainty as to whether a *qui tam* complaint that contains detailed allegations giving rise to a reasonable inference that false claims were submitted to the government, but that does not identify specific requests for payment, can be sufficiently particularized to withstand a motion to dismiss.

That uncertainty hinders the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States. *Qui tam* complaints under

---

[5] Contrast *Hopper* v. *Solvay Pharms., Inc.*, 588 F.3d 1318, 1326 (11th Cir. 2009) (holding that a relator must plead a specific false claim to avoid dismissal of his complaint), petition for cert. pending, No. 09-1065 (filed Mar. 4, 2010), with *United States ex rel. Walker* v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005) (permitting a relator to allege detailed information about a fraudulent scheme supporting an inference that the defendant submitted false claims), cert. denied, 549 U.S. 1027 (2006), and *United States ex rel. Clausen* v. *Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (stating that a *qui tam* complaint must contain "some indicia of reliability * * * to support the allegation of an actual false claim for payment") (emphasis omitted), cert. denied, 537 U.S. 1105 (2003). Cf. *Bledsoe*, 501 F.3d at 504 n.12 (declining to address whether a complaint must be dismissed "where a relator demonstrates that he cannot allege the specifics of actual false claims that in all likelihood exist, and the reason that the relator cannot produce such allegations is not attributable to the conduct of the relator").

the FCA are often filed by the defendants' employees and former employees. Such relators may know that their employers are receiving funds from the United States, and they may be privy to detailed information indicating that the employers' actual practices differ markedly from their representations to the federal government. Under the reading of Rule 9(b) that petitioner advocates, however, those relators would be disabled from filing suit under the FCA unless they were also familiar with the minutiae of their employers' billing practices.

Subjecting *qui tam* relators to that requirement is especially unwarranted because it attaches elevated significance to the relator's awareness of facts that in most instances are already known to the government. The government rarely if ever needs a relator's assistance to identify claims for payment that have been submitted to the United States. Rather, relators who make valuable contributions to the government's enforcement efforts typically do so by bringing to light information, outside the four corners of the claims for payment, that shows those claims to be false. Requiring *qui tam* complaints to identify specific false claims would not meaningfully assist the government's enforcement efforts. To the contrary, the likely effect of such a requirement would be to discourage the filing of *qui tam* suits by relators who would otherwise have both the means and the incentive to expose acts of fraud against the United States.

3. For the foregoing reasons, the second question presented in the petition is both unsettled and significant, and in an appropriate case it might well warrant the Court's review. This case, however, is not a suitable vehicle for addressing the application of Rule 9(b) to *qui tam* suits under the FCA. Because the question wheth-

er respondent qualifies as an "original source" under former Section 3730(e)(4)(B) goes to the subject-matter jurisdiction of the federal courts, see *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 467-470 (2007), the Court would be required to decide that issue before considering whether respondent's complaint pleaded fraud with adequate particularity. As explained above, plenary review of the antecedent jurisdictional question, which involves the construction of superseded statutory language, is neither necessary nor appropriate at this time. See pp. 13-14, *supra*. And if the Court were to conclude that respondent is not an "original source" under the now-superseded version of Section 3730(e)(4)(B), it could not resolve the Rule 9(b) issue that has continuing importance in future cases. Accordingly, this Court should deny certiorari on the second question presented.[6]

---

[6] The question whether a relator must identify a specific false claim in order to satisfy Rule 9(b) appears to be squarely presented in another case that is currently pending before the Court and that does not appear to contain any potential jurisdictional obstacle. See *United States ex rel. Hopper* v. *Solvay Pharms., Inc.*, No. 09-1065 (filed Mar. 4, 2010). The government is providing copies of this brief to counsel for the parties in *Hopper*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
DOUGLAS N. LETTER
CHARLES W. SCARBOROUGH
Attorneys

MAY 2010